A

PP

v.

KAMMOON WANNGA & ANOR

B

HIGH COURT MALAYA, KANGAR
ZAMANI A RAHIM JC
[CRIMINAL APPEAL NO: 45-04-2006]
18 AUGUST 2008

C ***CRIMINAL LAW:*** *Penal Code - Section 304 - Culpable homicide not amounting to murder - Plea of guilty - Sentence - Whether a custodial sentence appropriate - Duration of imprisonment - Whether must be sufficient to reform and act as deterrence - Mitigating factors considered - Murder not committed in course of crime nor pre meditated - Accused* D *persons first offenders - Whether clean record tilted in their favour - Whether second accused person should have a lesser sentence than first accused person who had struck the fatal blow - Proper sentences to be meted out accordingly*

E ***CRIMINAL PROCEDURE:*** *Sentence - Plea of guilty - Offence under s. 304 of Penal Code - Culpable homicide not amounting to murder - Whether a custodial sentence appropriate - Duration of imprisonment - Whether must be sufficient to reform and act as deterrence - Mitigating factors considered - Murder not committed in course of crime nor pre* F *meditated - Accused persons first offenders - Whether clean record tilted in their favour - Whether second accused person should have a lesser sentence than first accused person who had struck the fatal blow - Proper sentences to be meted out accordingly*

G The prosecution had tendered a consent to prosecute under s. 177A(1) of the Criminal Procedure Code, authorizing Kammoon Wannga, OKT1 and Pirom Wongjanta, OKT2 to be prosecuted for an offence of murder of a Thai male named Yusof Kolam under s. 302 of the Penal Code. Subsequently, the prosecution had put in an amended principal charge under s. 302 of the Penal H Code ('P3') and also an alternative charge for an offence of culpable homicide not amounting to murder, punishable under s. 304(a) of the Penal Code ('P4'). The charges, P3 and P4 were separately read and explained to OKT1 and OKT2 in the Thai language by a qualified court Thai interpreter. Each of them I understood the charges and each separately pleaded guilty to the alternative charge, P4 and both of them understood the nature and consequences of their pleas. Briefly, the facts were that the

deceased had made fun and laughed at OKT1 as he had succeeded to fool OKT1 to trap the 'musang' which was allegedly on the rubber trees at the rear of the deceased's shed but in fact there was none. OKT1 had been tricked by the deceased. Thereafter, a quarrel ensured between OKT1, OKT2 and two other friends who were still at large. OKT1 had grabbed a piece of wood ('P6') and had hit the deceased in the face/head causing the deceased to collapse. OKT2 and two other friends of theirs who were still at large had punched and kicked the deceased several times until he was lifeless. Having realised that the deceased had died, they had thrown him into the canal about 50 meters from the deceased's shed. The post mortem ('P7') revealed that the cause of death was 'head injury due to blunt trauma.' The learned DPP had tendered a murder weapon, namely, a piece of wood approximately three feet in length as exh.P6. Both the accused admitted that the statement of facts ('P5') were correct. Satisfied that the pleas of OKT1 and OKT2 were unequivocal, this court accepted their pleas of guilty and convicted them under the alternative charge, P4, of culpable homicide not amounting to murder under s. 304(a) of the Penal Code which carried a mandatory term of imprisonment of not exceeding 20 years and also liable to be fined. Counsel for OKT1 had put in a written submission that, *inter alia*, (i) OKT1 was a first offender; and (ii) OKT1 had pleaded guilty at the earliest opportunity when an alternative charge under s. 304(a) of the Penal Code was offered to him. As for OKT2, he had pleaded in mitigation, *inter alia*, that (i) he was a first offender and (ii) the role played by OKT2 was somewhat less aggressive compared to the role played by OKT1 in the commission of the crime as it had been OKT1 who had struck the fatal blow on the deceased's head with a piece of wood which was consistent with the cause of death stated in the postmortem report, P7, that was, head injury due to blunt trauma. While both OKT1 and OKT2 were praying for a lenient sentence, the learned DPP was asking for a deterrent sentence to be passed. According to the DPP, though OKT1 and OKT2 had pleaded guilty to the alternative charge under s. 304(a), it was not an automatic principle that a lenient sentence be given.

Held:

(1) The offence of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code was a serious offence. A life had perished. A custodial sentence was certainly called for. A non-custodial sentence such as a binding over in

A a certain amount of money for good behaviour with surety under s. 294 of the Criminal Procedure Code was quite inappropriate. The safety and security of the society must be protected and preserved at all times from undesirable elements. Any duration of imprisonment intended to be imposed must
B neither be too long, nor too short. The imprisonment term must be sufficient to reform and rehabilitate both OKT1 and OKT2 from going back to their old follies and at the same time the length of imprisonment term must act as a deterrence to the like minded persons. (paras 28 & 29)

C **(2)** The facts disclosed that the murder was not committed in the course of any crime *ie* armed robbery. Neither was there any pre-meditation. The deceased was partly to blame for his death as he was the source of the quarrel. The facts too disclosed
D that they were all drunk after consuming liquor. However, self induced intoxication was not a defence: s. 85(1) of the Penal Code. Regarding the murder weapon, it was a piece of wood measuring approximately three feet which OKT1 had picked up by chance at the scene of the murder. (para 32)

E **(3)** Both OKT1 and OKT2 were first offenders with no previous convictions. Their clean record tilted in their favour. OKT1 had pleaded that he was remorseful over the death of the deceased and had promised not to repeat similar or any other
F crimes in the future. Similarly, OKT2's plea was that he had repented and had tendered his apology to the family members of the deceased. Further, OKT1 and OKT2's pleas of guilty which were entered at the earliest reasonable opportunity which saved the trouble of calling the prosecution witnesses
G to take the stand were plus points for OKT1 and OKT2. A discount should be given to the extent of one-third of what otherwise would have been the sentence. Therefore, it was this court's discretionary power to sentence OKT1 to eight years and six months' imprisonment with effect from the date
H of arrest and sentenced OKT2 to eight years of imprisonment also from the date of arrest. The sentence of OKT1 was higher by six months imprisonment because of the role played by him. He had struck the fatal blow on the deceased's head which was consistent with the cause of death as stated in the
I postmortem report, that was, head injury due to blunt trauma. (paras 34, 35 & 36)

[Order accordingly.]

Cases referred to:

Abdul Karim v. R [1954] 1 LNS 3 ***(refd)***
Bhandalananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
Ganesan Nachiappan & Ors v. PP [2000] 3 CLJ 302 CA ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Mohd Abdullah Ang Swee Keng v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Chan Akau [2000] 1 LNS 218 ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 ***(refd)***
PP lwn. Mohd Fuad Othman [2000] 1 LNS 190 ***(refd)***
PP v. Dato Nallakaruppan Solaimalai [1999] 2 CLJ 596 ***(refd)***
PP v. Nasir Malik [1995] 1 LNS 196 ***(refd)***
PP v. Nazaruddin Ahmad & Ors [1993] 2 CLJ 543 HC ***(refd)***
PP v. Noor Hafidah Yeop Mat Isa & Yang Lain [2007] 7 CLJ 570 HC ***(refd)***
PP v. Ravindran & Ors [1992] 1 LNS 47 ***(refd)***
PP v. Safian Abdullah & Anor [1983] 1 CLJ 324; [1983] CLJ (Rep) 804 HC ***(refd)***
PP lwn. Soh Soo Yang & Anor [2000] 1 LNS 296 ***(refd)***
PP v. Soo Tai Leng [2005] 7 CLJ 218 HC ***(refd)***
PP v. Tai You Choy [1982] CLJ 78; [1982] CLJ (Rep) 687 HC ***(refd)***
PP v. Tay Chuan Beng & Anor [1989] 1 LNS 89 ***(refd)***
PP v. Tia Ah Leng [2000] 5 CLJ 614 HC ***(refd)***
R v. Ball 35 Cr App R 164 ***(refd)***
R v. Costen [1980] 11 Cri App (S) CA 182 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 ***(refd)***
Tia Ah Leng v. PP [2004] 4 CLJ 77 CA ***(refd)***
Vinaga Moorthy Gopal v. PP [2003] 1 CLJ 758 CA ***(refd)***
Yusmarin Samsudin v. PP [1999] 4 CLJ 391 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 177A(1), 294
Penal Code, ss. 34, 85(1), 302, 304(a)

For the appellant - Azman Abu Hassan; DPP
For the 1st respondent - Harminder Singh; Syarikat Harmindar Singh
For the 2nd respondent - S Devandran; M/s Devandran & Co

Reported by Suhainah Wahiduddin

A

JUDGMENT

Zamani Rahim J:

The Charge

B **[1]** The prosecution had, on 16 November 2006, tendered a consent to prosecute under s. 177A(1) of the Criminal Procedure Code, authorizing Kammoon Wannga, OKT1 and Pirom Wongjanta, OKT2 to be prosecuted for an offence of murder of a Thai male named Yusof Kolam under s. 302 of the Penal Code.
C The consent to prosecute and the charge were marked as exhs. P1 and P2 respectively.

[2] On 10 July 2008 OKT1 and OKT2 were again produced before the Kangar High Court. The prosecution had put in an
D amended principal charge under s. 302 of the Penal Code which was marked as exh. P3 and also an alternative charge for an offence of culpable homicide not amounting to murder, punishable under s. 304(a) of the Penal Code which was marked as exh. P4.

E **[3]** The amended principal charge, P3 read as follows:

Pertuduhan Utama (Pindaan)

Bahawa kamu bersama-sama dua orang lagi yang masih bebas pada 8 Mac 2006 antara jam 12.00 tengahari hingga 10 Mac
F 2006 jam lebih kurang 8.30 pagi di kawasan kebun getah Batu 21, Jalan Padang Besar, di dalam Negeri Perlis telah membunuh Yusob Kolam berumur 28 tahun (Satun Border Pass Thailand No. 1290) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Akta yang sama.

G **[4]** The alternative charge, P4 read as follows:

Pertuduhan Alternatif

Bahawa kamu bersama-sama dua orang lagi masih bebas pada 8
H Mac 2006 antara jam 12.00 tengahari hingga 10 Mac 2006 jam lebih kurang 8.30 pagi di kawasan kebun getah Batu 21, Jalan Padang Besar, di dalam Negeri Perlis, telah menyebabkan kematian kepada Yusob Kolam berumur 28 tahun (Satun Border Pass Thailand No. 1290) dengan niat menyebabkan kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan
I dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Akta yang sama.

The Plea Of Guilty

[5] The charges, P3 and P4 were separately read and explained to each of them ie, OKT 1 and OKT2 in the Thai language by a qualified court Thai interpreter. Each of them understood the charges, P3 and P4. OKT1 and OKT2 separately pleaded guilty to the alternative charge, P4 and both of them understood the nature and consequences of their pleas.

[6] The statement of facts were read by the learned Deputy Public Prosecutor (DPP) and explained to each of them. The statement of facts were as follows:

Fakta Kes

Kejadian berlaku semasa OKT1 dan OKT2 serta 2 lagi rakan mereka yang masih bebas sedang minum minuman keras sehingga mabuk. OKT1 menceritakan kepada OKT2 beliau mengesyaki simati telah mengambil dompetnya. Selepas itu OKT1 terus beredar dan balik ke dangaunya untuk menutup enjin penyiram pokok tembikai tanpa diketahui oleh OKT2 dan dua lagi rakan mereka.

Semasa OKT1 berada di dangau miliknya, simati telah datang dan mengajak OKT1 menangkap musang. Apabila sampai di dangau milik simati, simati memberitahu musang berada di atas pokok getah di belakang dangau tetapi OKT1 kemudiannya mendapati musang yang dimaksudkan oleh simati tiada. OKT1 kemudiannya melihat simati mentertawakanya kerana berjaya mempermainkan OKT1.

Tidak lama selepas itu, OKT2 dan dua lagi rakan mereka yang masih bebas dalam keadaan mabuk telah sampai di dangau milik simati dan mendapati OKT1 berada di situ. Salah seorang daripada rakan OKT1 dan OKT2 memanggil simati keluar dari dangau. Semasa berada di luar dangau simati, telah berlaku pertengkaran di antara simati, OKT1 dan OKT2 dan dua lagi rakan mereka yang masih bebas. *OKT1 kemudiannya telah mencapai sebatang kayu dan menyerang simati dengan memukul di bahagian muka simati dengan kuat menyebabkan simati terjatuh.* Selepas itu OKT2 dan dua orang lagi rakan mereka yang masih bebas turut menumbuk dan menendang simati berkali-kali sehingga simati menjadi lemah, tidak mampu untuk melawan dan seterusnya mati.

Selepas OKT1 dan OKT2 dan dua lagi rakan mereka yang masih bebas menyedari simati telah mati mereka telah mengangkat dan membuang simati ke dalam terusan yang berada lebih kurang 50 meter daripada dangau milik simati.

Pada 10/03/2006 lebih kurang jam 9.25 pagi satu aduan telah diterima daripada orang awam iaitu Ismail bin Ibrahim mengenai satu penemuan mayat di dalam terusan di kebun getah berhampiran kilang pukat di kawasan perindustrian Padang Besar dan hasil siasatan mendapati simati dikenali sebagai Yusob Kolam seorang warganegara Thailand dan simati adalah orang yang telah diserang dan dibuang ke dalam terusan oleh OKT1 dan OKT2 dan dua lagi rakan mereka yang masih bebas.

Laporan 'Post Mortem" mengesahkan bahawa sebab-sebab kematian adalah "head injury due to blunt trauma". Ini bersamaan dengan senjata yang digunakan iaitu satu objek tumpul yang berat. Kecederaan serius dikesan pada bahagian kiri kepala simati dan terdapat juga kesan koyakan pada bahagian tepi mata sebelah kanan. Selain itu terdapat juga "multiple crack" pada tengkorak kepala simati dan keretakan pada tulang muka simati.

Berdasarkan siasatan mendapati OKT1 dan OKT2 secara niat bersama melakukan kesalahan telah mematikan orang dengan salah. Seterusnya OKT1 dan OKT2 dituduh dengan sewajarnya.

[7] The statement of facts were marked as exh. P5. Having read the facts, the learned DPP had tendered a murder weapon, namely, a piece of wood approximately 3 feet in length as exh. P6. Followed by a postmortem report on the deceased, Yusob Kolam as exh. P7. Both the accused admitted that the statement of facts, P5 were correct.

[8] After I was satisfied that OKT1 and OKT2's pleas were unequivocal, I have accepted their pleas of guilty and convicted them under the alternative charge, P4 of culpable homicide not amounting to murder under s. 304(a) of the Penal Code which carries a mandatory term of imprisonment of not exceeding 20 years and also liable to be fined.

[9] Mitigation

a) OKT1

The counsel for OKT1 had put in a written submission together with the authorities. The mitigation may be summarized as follows:

1) OKT1 is a Thai citizen, aged 35 years old. He is unmarried,

2) His mother had passed away. His father is now aged 87 years and in a very poor health,

3) He was a first offender,

4) He came to Malaysia to seek employment. At the time of the incident, he was employed at a water melon plantation, drawing an income of about RM600 per month.

5) OKT1 had pleaded guilty at the earliest opportunity when an alternative charge under s. 304(a) of the Penal Code was offered to him. By pleading guilty, he had saved costs and time of the court. The counsel sought a discount on the custodial sentence that would have been imposed after a full trial in this type of offence. The learned counsel also recognized the disparity of sentence may be imposed having regard to the roles played by the accused: see *PP v. Ravindran* [1992] 1 LNS 47, *PP v. Nazaruddin bin Ahmad & Ors* [1993] 2 CLJ 543.

6) The learned counsel recognized that in deciding the appropriate sentence, the first and foremost consideration is public interest: see *PR lwn. Mohd Fuad bin Othman* [2000] 1 LNS 190, and

7) OKT1 had realized that he had made a grave mistake in his life and remorseful of what he had done. He promised not to commit any criminal offence in future.

b) OKT2

The learned counsel on behalf of OKT2 had pleaded in mitigation as follows:

1) OKT2 is also a Thai national, aged 36 years old, a married man with two children, aged 15 years and 13 years old respectively,

2) OKT2 had divorced with his wife about 12 years ago and his children are now being look after by his parents,

3) He is a first offender,

4) The learned counsel submitted that it is an accepted rule of practice that by pleading guilty the accused is entitled to be given a discount on custodial sentence, though it is not automatic: see *Mohd Abdullah Ang Swee Keng v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209,

5) The court must strike a balance between the public interest and the interest of the accused: see *PP v. Loo Choon Fatt* [1976] 1 LNS 102,

A 6) The role played by OKT2 was somewhat less aggressive compared to the role played by OKT1 in the commission of the crime. It was OKT1 who had struck the fatal blow on the deceased's head with a piece of wood which was consistent with the cause of death stated in the postmortem report, P7,
B that is, 'head injury due to blunt trauma',

7) OKT2 had regretted and he apologized to the family members of the deceased,

C 8) The counsel urged this court that the sentence be imposed from the date of his arrest,

Prosecution Reply To OKT1 And OKT2 Mitigation

[10] While both OKT1 and OKT2 were praying for a lenient
D sentence, the learned DPP was asking for a deterrent sentence to be passed. Though they had pleaded guilty to the alternative charge under s. 304(a), it was not an automatic principle that a lenient sentence be given: see *Tia Ah Leng v. PP* [2004] 4 CLJ 77.

E **[11]** The offence of culpable homicide not amounting to murder under s. 304(a) is a serious offence. The sentence that was going to be passed by this court must commensurate with the crime committed by them with the purposes of reforming and
F rehabilitating of OKT1 and OKT2 and also to serve as a deterrent to the offenders of the like mind. The learned DPP had cited the case of *PP v. Safian bin Abdullah & Anor* [1983] 1 CLJ 324; [1983] CLJ (Rep) 804; where Wan Yahya J had imposed a sentence of 14 years imprisonment.

G **[12]** The learned DPP also cited the Court of Appeal case of *Yusmarin bin Samsudin v. PP* [1999] 4 CLJ 391 on the principles of sentencing where Her Ladyship Siti Norma Yaakob JCA said that the court is empowered to take the following considerations:

H 1) the extent and seriousness of the offence committed.

2) the guilty antecedents, and

3) the public interest factor.

I **[13]** The learned DPP submitted that the personal hardship caused to the accused was more often than not outweighed the public interest factor. The interests of the accused must be balanced with the interests of the public.

Sentencing Principles And Guidelines

[14] The power of sentencing given to a trial court is discretionary one and in order to disturb the sentence imposed, an appellate court must be convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorized or extraneous exercise of discretion. In the Federal Court case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139 Raja Azlan Shah, Ag. LP said:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a **discretion** vested in him, is the sentence so far out side the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may some times reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court: has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorized or extraneous or irrelevant exercise of discretion ...

[15] In the same vein the Court of Appeal case of *Ganesan Nachiappan & Ors v. PP* [2000] 3 CLJ 302, Haidar Mohd Noor JCA expressed his view as follows:

A The power of sentencing given to a trial court is a discretionary one and in order for us, as the appellate court, to disturb the sentence imposed, we must be convinced that the trial judge had erred in applying the correct principles of sentencing or had embarked on some unauthorized or extraneous exercise of discretion (see *PP v. Loo Choon Fatt* [1976] 1 LNS 102 and *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139).

[16] On pleading guilty, the accused person is normally given credit or discount. In the Supreme Court case of *Mohamed Abdullah Ang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; C Mohamed Azmi SCJ had expressed his view as follows:

It is generally accepted that the extent of reduction an account of a plea of guilty would be between one quarter and one third of what otherwise would have been the sentence.

D **[17]** If a plea of guilty is made too late in the trial it may cease to have mitigating effect. In *PP v. Dato Nallakaruppan Solaimalai* [1999] 2 CLJ 596, Arifin Jaka J said:

Pengakuan salah oleh orang yang kena tuduh adalah salah satu E faktor yang diambil kira oleh mahkamah apabila menjatuhkan hukuman dan merupakan salah satu faktor untuk meringankan hukuman. Di dalam kes sekarang, OKT telah mengaku salah hanya selepas dua belas hari perbicaraan dijalankan dan setelah pertuduhan asal telah dipinda. Banyak masa telah terbuang dan saksi-saksi telah mengalami kesulitan. Oleh itu pengakuan salah F yang dibuat oleh OKT di dalam keadaan ini tidaklah boleh diterima sebagai satu fakta yang boleh meringankan hukuman.

[18] It is, therefore, desirous that the plea of guilty be entered at an earliest reasonable opportunity before the witnesses give G evidence in the trial. Only then such a plea may be considered as a meaningful mitigating factor.

[19] The rationale that the plea of guilty should be treated as a mitigating factor as "it not only saves the country a great expense of a length trial but also saves time and inconvenience, particularly H witnesses": per Suffian LP in *Sau Soo Kim v. PP* [1975] 1 LNS 158.

[20] However, a caveat may be placed here. Not in every cases of pleading guilty, the accused is entitled to an automatic I reduction of sentence. In the case of *PP v. Chan Akau* [2000] 1 LNS 218 the accused pleaded guilty for an offence of culpable

homicide not amounting to murder under s. 304(a) of the Penal Code and the accused was sentenced to ten years imprisonment. His Lordship Augustine Paul J said that there was no provision upon pleading guilty as a rule of thumb the accused is to be given a lenient sentence. His Lordship referred to Lord Lane CJ in the case of *R v. Costen* [1980] 11 Cri. App. (S) CA 182 as follows:

> But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount.

[21] Another important factor for the trial court to take into account is the public interest factor. Hilbery J in the case of *R v. Ball* 35 Cr. App R 164 had expressed his views as follows:

> The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[22] The above observation by Hilbery J has been followed in several local cases. See the case of *PP v. Loo Choon Fatt* [1976] 1 LNS 102 and *PP v. Tia Ah Ling* [2000] 5 CLJ 614. The public interest factor is subject to qualifications. It varies according to time, place and circumstances of each case. In *New Tuck Shen v. PP* [1982] CLJ 38; [1982] CLJ (Rep) 606, Wan Yahya J (as he then was) explained at p. 30-31 in the following words:

> Public interest varies according to time, place and circumstances of each case including its nature and prevalence. What may be of public interest in one place may differ from another. Similarly, inducement to turn from criminal ways into honest living can take several forms and will have to depend to a greater extent on the attitude of the offender and his suitability for any particular type of reformation.

[23] The offence of culpable homicide not amounting to murder under the first limb of s. 304 of the Penal Code is a serious offence. This is reflected in its punishment. Section 304(a) which provides:

> Whoever commits culpable homicide not amounting to murder shall be punished:
>
> (a) with imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
>
> (b) ...

[24] The trial court must also look at the overall picture in a proper perspective to determine the length of custodial sentence. In the Court of Appeal case of *Vinaga Moorthy Gopal v. PP* [2003] 1 CLJ 758, Gopal Sri Ram JCA stipulated four factors to be considered. His Lordship said:

> In assessing the length of custodial sentence, the court must look at the overall picture in perspective by considering, firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence of mitigating factors, and, fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than what the facts of the offence warrant.

[25] As regard the imposition of a deterrent sentence, Brown Acting CJ in *Abdul Karim v. R* [1954] 1 LNS 3 had made the following observation:

> In the matter of punishment, the 'type of offence" is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. The particular offence, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided. Any tendency to standardise punishment for any type of offence is to be deplored because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type.

[26] On disparity of sentences, the general rule is that any unfair and unjust sentences amongst two or more accused persons should be avoided. However, there are cases where disparity of sentences are recognized by our courts: see *PP v. Ravindran & Ors* [1992] 1 LNS 47 and *PP v. Nazarudin bin Ahmad & Ors* [1993] 2 CLJ 543. A range of sentences imposed may depend on a number of considerations, *inter alia*, the differences in their mitigation, the role played by each of the accused persons and the degrees of culpability, their antecedents etc. The following principles are stated by Thomas in *Archbold* 1993:

> Where two or more offenders are to be sentenced for participation in the same offence, the sentences passed on them should be the same, unless there is a relevant difference in their responsibility for the offence or their personal circumstances. If there are reasons for imposing a particular form of sentence ... on one which does not apply to the other, it is not necessarily wrong to make such an order in respect of one and impose a sentence of imprisonment on the other. (Para 5-169).

Comparison With Sentences In Other Cases For Similar Offences

[27] For comparison with sentences in other cases for similar offences to determine the trend of sentencing policy, below are some of the past decided cases with emphasis on the accused violent conduct and the type of weapons used.

1) *PP v. Ravindran & Ors (supra)*

> The six accused and two others still at large had abducted the deceased and stabbed and punched him several times. The body of the deceased was then thrown into a stream at Sentul. The deceased died of his injuries.
>
> The original charge of murder under s. 302 of the Penal Code had been amended to the first limb of s. 304 of the Penal Code. All the six accused pleaded guilty to the reduced charge.
>
> Sentence: 1) 1st, 3rd, 4th, 5th and 6th accused were sentenced to eight years imprisonment from date of arrest.

A

2) 2nd accused who had two previous convictions was sentenced to eight years and six months imprisonment from date of arrest.

2) *PP v. Nazarudin bin Ahmad & Ors (supra)*

B

A deceased body was found lying in an open space. 1st, 2nd and 3rd accused were subsequently arrested. Police investigation revealed that the three accused hijacked a taxi driven by the deceased. While in the kampung road, the 1st accused took out a revolver from his waist and demanded money from the deceased. As the deceased had no money, the 1st accused shot the deceased head. The deceased body was removed from the taxi and dumped on the ground. The accused drove the taxi and later abandoned it.

C

D

Police investigation revealed that the 1st accused stole the said revolver from a police detective. A post mortem on the deceased disclosed that the cause of death was due to gun shot wound on the head.

E

All the three accused pleaded guilty to an amended charge under the first limb of s. 304 of the Penal Code.

Sentence: 1) 1st accused, 22 years old was sentenced to eight years imprisonment from date of remand.

F

2) 2nd accused, 27 years old who had previous convictions was sentenced to nine years imprisonment from date of remand.

3) 3rd accused, slightly 17 years old, a juvenile and first offender was sentenced to five years imprisonment from date of remand.

G

3) *PP v. Tai You Choy* [1982] CLJ 78; [1982] CLJ (Rep) 687

H

The accused and deceased were known to each other. The deceased abused the accused. He too threatened to dismiss the accused from employment. The accused felt humiliated and shamed. The accused retaliated. He chased the deceased who ran up to the first floor. When the accused came face to face with the deceased, the deceased armed with an iron pipe swung at the accused. It missed him. The accused stabbed the deceased with a sharp bearing scrapper on the chest which ruptured the deceased's heart. He died.

I

The accused pleaded guilty to an amended charge under s. 304 of the Penal Code. He had three previous convictions as follows:

1) three years imprisonment for an offence of robbery, four years imprisonment and two strokes of the rotan for being in possession of offensive weapon. The sentence to run concurrently.

2) 1 year imprisonment and three strokes of rotan for an offence of attempted extortion, and

3) one year imprisonment and 1 stroke of rotan for being in possession of offensive weapon.

Sentence: eight years imprisonment from date of arrest.

4) *PP v. Soo Tai Leng* [2005] 7 CLJ 218

A quarrel between an estranged husband and wife. The accused wife poured petrol on the deceased husband and set him on fire. The deceased husband suffered severe burnt and subsequently he died.

At the close of the prosecution case, the murder charge under s. 302 of the Penal Code was amended to culpable homicide not amounting to murder under s. 304(a).

Sentence: eight years imprisonment from date of arrest.

5) *PP v. Tay Chuan Beng & Anor* [1989] 1 LNS 89.

The 2nd accused was a prostitute. The deceased had intercourse with her. Not only he did not pay for her service, he grabbed the 2nd accused bag which contained some money. The 2nd accused resisted. The deceased punched her on the face several times. Subsequently, the 2nd accused together with the 1st accused confronted the deceased. The 1st accused picked up an iron pipe along the way and attacked the deceased. The 2nd accused (appellant) participated in the attack by using her fists.

The 1st and 2nd accused pleaded guilty to the charge under s. 304 of the Penal Code.

The 2nd accused (appellant) had a history of mental illness - schizophrenic illness.

Sentence: eight years imprisonment of arrest.

6) *PP v. Noor Hafidah Yeop Mat Isa & Yang Lain* [2007] 7 CLJ 570

OKT1 was same what jealous of the deceased. OKT1 gathered OKT2, OKT3 and Uda and hatched a plan to injure and if needed be to kill her. OKT1 identified the deceased to OKT2 and OKT3. OKT2 and OKT3 went to the deceased house and a struggle occurred between OKT2 and the deceased. OKT3 assisted OKT2. OKT2 stabbed 3 to 4 times on the deceased abdomen, chest, neck and on his back. OKT2 also smashed the deceased head and body with a dressing table chair. OKT3 and OKT2 took the deceased's gold bracelets and gold necklaces. OKT2 and OKT3 left the deceased's house in a waiting car driven by Uda.

OKT1, OKT2 and OKT3 were charged for an offence of murder under s. 302 of the Penal Code read with s. 109 of the Penal Code. After nine witnesses gave evidence, the charge against OKT1 was amended to s. 109 and s. 304(a) of the Penal Code.

Whilst the charge against OKT2 and OKT3 was amended to s. 304(a) of the Penal Code.

OKT1, OKT2 and OKT3 pleaded guilty to the amended charge.

Sentence: 1) OKT1 was sentenced to 71/2 years imprisonment from date of arrest.

2) OKT2 and OKT3 were sentenced to 11 years imprisonment from date of arrest.

7) *PP lwn. Soh Soo Yang & Anor* [2000] 1 LNS 296

At the request of her aunt, the 1st accused, 2nd accused and one YKC who was still at large, armed with 2 parangs and a stick attacked the deceased at a condominium car park. They brought along the parangs and the stick. The deceased escaped and ran out to the main road. The 2nd accused

drove a van and caught up with the deceased at the main road. The 1st accused and YKC attacked the deceased until he died.

The 1st and 2nd accused had pleaded guilty to a re-amended charge under s. 304(a) of the Penal Code.

Sentence: 1) The 1st accused was sentenced to 13 years imprisonment.

2) The 2nd accused was sentenced to nine years imprisonment.

Both sentences to commence from date of arrest.

8) *PP lwn. Chan Akau* [2000] 1 LNS 218

The accused approached the deceased who was with his friend in front of a restaurant. The accused scolded, abused and chased the deceased and his friend. The accused then went to the restaurant and came back to the accused with two choppers. The accused swung the said chopper and struck the deceased neck. When he saw the deceased neck was bleeding, the accused ran away. He threw away the chopper near the restaurant.

The accused pleaded guilty to the amended charge under s. 304(a) of the Penal Code.

Sentence: 10 years imprisonment from date of arrest.

9) *PP v. Nasir bin Malik* [1995] 1 LNS 196.

The deceased had an argument and a fight with the accused in the bus. The deceased disembarked from the bus and sought help from his friend.

The deceased and his friend chased the bus on a motorbike. The bus was stopped. The accused ran away but was caught by the deceased. A struggle ensued. The accused took out a knife and stabbed the deceased a few times in the back and chest. The accused then fled.

The accused pleaded guilty to the amended charge under s. 304(a) of the Penal Code.

Sentence: 12 years imprisonment from date of arrest.

10) *PP v. Safian bin Abdullah & Anor* [1983] 1 CLJ 324; [1983] (Rep) CLJ 804.

The 1st accused, 20 years old and 2nd accused, 21 years old, planned a robbery. The 1st accused was armed with a lethal weapon 'kerambit'. The 2nd accused was equipped with a pair of hand gloves. They went to the deceased shop. They lured him out of the shop. Having entered the shop, the 2nd accused grabbed the deceased and stuffed the hand gloves into the victim's mouth. The 1st accused came out from the hiding spot, slashed the deceased. The deceased who overpowered and dragged him and mercilessly attacked him with the 'kerambit', crushed the deceased head with empty bottles and used a rope to strangle him. The attack was ferocious. The deceased suffered multiple deep wounds on his body, neck and face. Several of his ribs were broken. The deceased died from thoracic, intra cranial and intra abdominal injuries with asphyxia due to strangulation.

The 1st and 2nd accused pleaded guilty to an amended charge under s. 304(a) of the Penal Code. In delivering his judgment, Wan Yahya J (as he then was) said:

> In my opinion these two accused, in spite of their ages, are dangerous young criminals of aggressive propensity. Unless they are properly reformed they will continue to be a serious menace to society. A sufficiently long period of detention will be required for their correction, reformation and rehabilitation before they can be allowed to return to society.

Sentence: OKT1 and OKT2 were sentenced to 14 years imprisonment from date of arrest.

11) *Vinaga Moorthy Gopal v. PP* [2003] 1 CLJ 758

The appellant and six others armed with an assortment of weapons that included six parangs, a pipe and a bottle approached the house of the victim. There they set upon their victim. Their physical attack resulted in the death of Rajasegaran.

The appellant and two others were charged under s. 304 read with s. 149 of the Penal Code. They pleaded guilty and were sentenced to 12 years imprisonment.

The appellant appeal against sentence was dismissed. Gopal Sri Ram JCA said:

> To these elements, we would add the necessity for the court to take into account the public interest which is the paramount consideration in all sentencing cases.
>
> We have considered this case most carefully. The circumstances in which the offence was committed are grave indeed. Mr. Chandra with his customary frankness conceded that the **facts disclose pre-meditation.** This is therefore not a case of chance medley where the victim and the appellant know each other. Having regard to the serious nature of the offence and taking into account those factors which we have referred to a moment ago, we are unable to say that the sentence in the present case is manifestly excessive.

12) *Ganesan Nachiappan & Ors v. PP* [2000] 3 CLJ 302

Originally the six appellant were charged for murder under s. 302 of the Penal Code read with s. 34 of the Penal Code. Mid-way through the prosecution case, the charge was amended to s. 304(a) read with s. 34 of the Penal Code.

All the appellants pleaded guilty to the amended charge under s. 304(a) read with s. 34 of the Penal Code.

The learned trial judge sentenced each of the appellant to 14 years imprisonment from the date of their respective arrest. Dissatisfied, hence this appeal by the appellants. The prosecution also cross-appeal alleging inadequacy of the sentence.

The Court of Appeal dismissed the appellants' appeal as well as the prosecution cross appeal. Haidar Mohd Noor JCA commented on the appellants' appeal as follows:

> The injuries inflicted on the deceased were serious. There were altogether **45 stab wounds**. The gory photographs at pp. 285 to 288 of the appeal record clearly showed the seriousness of the injuries. The deceased was badly disfigured. The learned judge was therefore right to take into account the public interest element in view of the seriousness of the offence committed by the appellants.

Of the prosecution cross-appeal, His Lordship said:

> As regards the cross-appeal by the Public Prosecutor, we were of the opinion that the sentence imposed is not manifestly inadequate for the reason that the learned judge had properly exercised his discretion and he had taken into account the interests of the appellants and balanced them with the public interest. In the circumstances we should not disturb the sentence imposed. The cross-appeal was accordingly dismissed.

Sentences Of This Court

[28] I have no doubt that the offence of culpable homicide not amounting to murder punishable under s. 304(a) of the Penal Code is a serious offence. A precious life of Yusof Kolam, a young man of Thai nationality, aged 28 years had perished forever. His life is priceless and no amount of money may redeem or bring back his life from the grave. What was left is the grief and sorrow suffered by the family members of the deceased. Having studied the authorities enumerated above, a custodial sentence is certainly called for. A non-custodial sentence such as a binding over in a certain amount of money for good behaviour with surety under s. 294 of the Criminal Procedure Code is quite inappropriate. The next question to be addressed is – what is the appropriate length of custodial sentence which is neither manifestly excessive, nor manifestly low in the circumstances of this case.

[29] The most pivotal factor that I have taken into consideration is the interest of the public or society. The safety and security of the society must be protected and preserved at all times from undesirable elements. Any duration of imprisonment intended to be imposed must neither be too long, nor too short. The imprisonment term must be sufficient to reform and rehabilitate both OKT1 and OKT2 from going back to their old follies and at the same time the length of imprisonment term must act as a deterrence to the like minded persons. If the term is too long and harsh, OKT1 and OKT2 may find it difficult to fit and settle themselves in the society, upon their release from the prison gate. If this is to happen, it is not only unbeneficial to both OKT1 and OKT2 but also not in the interest of the society at large. OKT1 and OKT2 should be encouraged to return to the main stream of the society to lead a peaceful and harmonious life.

[30] Another factor that this court takes into account is the *modus operandi* of the murder. In this case, the facts disclosed that the murder was not committed in the course of any crime, for example, an armed robbery. Neither was there any pre-meditation. The manner the murder was committed is not as ferocious and gruesome as the murder in *Safian bin Abdullah & Anor (supra)* which authority is relied upon by the learned DPP to impress this court to impose a deterrent sentence. Let us re-visit the facts of the instant case. The deceased was partly to blame for his death. He was the source of the quarrel. The deceased had made fun and laughed at OKT1 as he had succeeded to fool OKT1 to trap the 'musang' which was allegedly on the rubber trees at the rear of the deceased shed but in fact there was none. He was trick by the deceased. Thereafter, the quarrel ensued between OKT1, OKT2 and two other friends who were still at large. OKT1 grabbed a piece of wood, P6 and hit the deceased in the face/ head. The deceased collapsed. OKT2 and two friends of theirs who were still at large punched and kicked the deceased several times until he was lifeless. Having realized that the deceased had died, they carried and threw him into the canal about 50 meters from the deceased shed. The facts too disclosed that they were all drunk after consuming liquor. However, self-induced intoxication is not a defence: see s. 85(1) of the Penal Code and the Federal Court case of *Kenneth Fook Mun Lee v. PP* [2006] 4 CLJ 359. The facts in *Safian bin Abdullah & Anor (supra)*, are these. Both the accused were dangerous young criminals of aggressive propensity. They had planned the robbery. They lured the deceased and an old man out of his shop. The 2nd accused stuffed the hand gloves into the old man's mouth. The 1st accused emerged from the dark hiding spot and slashed the deceased. The deceased was overpowered, dragged him and mercilessly attacked him.

[31] The attack was ferocious.The deceased suffered multiple deep wounds on his neck, body and face. Several of his ribs were fractured. The deceased was also strangled using a rope. The cause of death was thoracic, intra cranial and intra abdominal injuries with asphyxia due to strangulation.

[32] As regard the murder weapon, in this case it was a piece of wood measuring approximately 3 feet which OKT1 picked up by chance at the scene of the murder. While in *Safian bin Abdullah & Anor (supra)*, the 1st accused was armed with a lethal weapon

A 'kerambit' and the 2nd accused was equipped with a pair of hand gloves. On those facts, Wan Yahya J sentenced the 1st and 2nd accused to 14 years imprisonment from the date of their arrest. His Lordship said *inter alia*, "a sufficiently long period of detention will be required for their correction, reformation and rehabilitation
B before they can be allowed to return to society".

[33] In *Vinaga Moorthy Gopal (supra)*, there were an assortment of weapons, including six parangs, a pipe and the facts disclosed pre-meditation; in *Ganeson Nachiappan & Ors (supra)*, there were
C 45 stab wounds on the deceased body; in *Nasir bin Malik (supra)*, the accused used a knife to stab the deceased; in *Chan Akau (supra)*, the accused was armed with two choppers which he struck the deceased neck; in *Son Soo Yang & Anor (supra)*, the two accused were armed with two parangs and a stick and *Noor*
D *Hafidah Yeop Mat Isa & Yang Lain (supra)*, the murder was committed in the course of armed robbery of gold bracelets and necklaces. The deceased was stabbed 3 to 4 times in the abdomen, chest, neck and at the back.

E **[34]** On OKT1's emotional plea that his mother had passed away and his aged father is now in poor health and OKT2's plea that he was a widower for 12 years and his children, aged 15 years and 13 years respectively are now under the care of his parents have no mitigating effect. The pleas of family hardship are
F commonly encountered in mitigation in criminal proceedings to attract sympathy from the court. However, I do take into consideration that both OKT1 and OKT2 were first offenders with no previous convictions. Their clean record tilt in their favour. Even the accused who had three previous convictions of similar
G nature in *Tai You Choy (supra)* had received a sentence of eight years imprisonment from the date of arrest.

[35] This court, too, is with OKT1 when he pleaded that he was remorseful over the death of the deceased and had promised not to repeat similar or any other crimes in future. Similarly OKT2's
H plea that he had repented and, he tendered his apology to the family members of the deceased.

[36] OKT1 and OKT2 pleas of guilty which were entered at the earliest reasonable opportunity which save the trouble from calling
I the prosecution witnesses to take the stand are plus points for OKT1 and OKT2 which I considered in their favour. A discount should be given to the extent of one-third of what otherwise

would have been the sentence. According to Visu Sinnadurai J in *Ravindran & Ors (supra)*, having compared sentences in other cases of similar offence, said at p. 52 as follows:

> It, therefore, appears that the practice in Malaysia and Singapore, as a general rule, is to impose an **eight to ten** year term of imprisonment for a similar offence.

[37] As can be seen from 12 authorities listed above, the range of sentences under s. 304(a) imposed on the accused persons who plead guilty are roughly between eight years to 14 years imprisonment, of course, depending on the facts of each individual case. In this case, if OKT1 and OKT2 had claimed trial to the alternative charge, P4 and in the event that I found them guilty, I have no qualms to sentence them to 12 years imprisonment. Having given a discount of one-third, I therefore, exercise my discretionary power, to sentence OKT1 to eight years and six months imprisonment with effect from the date of arrest and sentenced OKT2 to eight years of imprisonment also from the date of arrest. The sentence of OKT1 is higher by six months imprisonment because of the role played by him. He struck the fatal blow on the deceased head which was consistent with the cause of death as stated in the postmortem report, P7, that is, head injury due to blunt trauma.